1971

Wasatch Mines Company v. William Hopkinson : Respondent's Brief

IN THE SUPREME CO
OF THE STATE OF U

WASATCH MINES COMPANY,
a Utah corporation,
Plaintiff,
Respondent, and
Cross-Appellant;
vs.
WILLIAM H. HOPKINSON,
an individual,
Defendant,
Appellant, and
Cross-Respo

BRIEF OF R
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Appeal from the Ju
District Court fo
The Honorable St

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Case No.
11599

BRIEF OF RESPONDENT AND CROSS-APPELLANT

STATEMENT OF KIND OF CASE

This is an action by Plaintiff to compel the Defendant to pay for some 1,600 tons of top soil which Defendant had previously removed from land owned by the Plaintiff, and for which no payment had been made. Defendant counterclaimed alleging the existence of a lease agreement and prayed for an award of damages resulting from Plaintiff's repudiation of said lease.

DISPOSITION IN LOWER COURT

After a trial on the merits before the Honorable Stewart M. Hanson, Judge of the Third Judicial District for the County of Salt Lake, sitting without a jury, the Court held that the testimony presented, together with the practice over the years indicated that Defendant was under no obligation to pay for said top soil until such time as it had actually been sold by him.

The Court further held that the statute of limitations would bar any claim which the Plaintiff might have at such time as the soil might be sold.

The Trial Court held that the terms and conditions of the purported lease agreement were so vague and uncertain that the Court could not interpret them. The Court held that Defendant's prayer for damages could not be granted because the damages were so speculative. The Court held that even if it could find for the Defendant, it would be unable to determine damages.

RELIEF SOUGHT ON APPEAL

As Respondent, Plainitff seeks affirmance of the judgment of the Trial Court denying Defendant, Appellant's Counterclaim and prayer for damages.

As Cross-Appellant, Plaintiff seeks a reversal of the judgment of the Trial Court denying Plaintiff's claim.

STATEMENT OF FACTS

Although Plaintiff generally agrees with the chronological development of the facts as stated by Defendants, certain pertinent facts have been misstated, certain per-

tinent facts have been omitted entirely and certain erroneous conclusions have been drawn from the facts as stated. Defendant's statement of the facts is not reflective of the true posture of the case. It is mainly an argument of Defendant's point of view and not of assistance in determining whether the judgment below is supported by the evidence.

Plaintiff has for a period of many years owned certain patented lode mining claims in Little Cottonwood Canyon of Salt Lake County, State of Utah. (R-1, 7, 9). In 1953 the Alta Wasatch Development Company was formed by several officers and directors of the Plaintiff company. (Defendant's Deposition pages 10, 11, 12, 69). The purpose of the new company was to develop mineral interests on the Flagstaff claim, one of the claims owned by Plaintiff company. (R-109, Defendant's Deposition pages 11, 12, 69).

The Defendant, who was an officer and director of the Alta Wasatch Development Company, (Defendant's Deposition pages 7, 8, 10, 66), and also an officer of the Plaintiff company, (Defendant's Deposition pages 14, 64), felt there was some economic value to the top soil on Plaintiff's land. He made a proposal to the other officers and directors that he be given the opportunity to remove some of this soil for purposes of resale. Defendant claims to have entered into a written agreement with one corporation or the other, granting him this opportunity. (R-117, 118, Defendant's Deposition pages 15, 16, 18). Neither Plaintiff nor Defendant have been able to produce even a copy of this agreement. It would appear that it is either lost, (R-117, 114, Defendant's Deposition pages 19, 23),

or that it was "scrapped" in 1956. (Defendant's Deposition page 23). Consequently, the parties and terms of this alleged original agreement are not known.

Defendant introduced into evidence three documents which he claims are amendments to the alleged original lease agreement, in an attempt to establish the terms and conditions of the alleged agreement. (Exhibits D-3, D-4 and D-7).

During the time the Defendant and Plaintiff have been associated, a considerable amount of top soil has been removed by the Defendant. In approximately 1952, Defendant removed one truckload of soil for experimental purposes (Defendant's Deposition pages 35, 36), and again in November of 1955, fifty tons were removed for additional tests (Defendant's Deposition page 36). During the Fall of 1963, an additional 260 tons were removed. All of this soil has been paid for by the Defendant, (Defendant's Deposition pages 36, 42), and consequently, is not included in Plaintiff's claim against Defendant.

During the Fall of 1958, Defendant removed an additional 1,600 tons of soil from the property of the Plaintiff. This soil was stockpiled in Salt Lake City, Utah, at the home of the Defendant's sister and neighbor, pending shipments during the Winter to purchasers in Las Vegas, Nevada. (Defendant's Deposition pages 16, 17, 38, 39, 52). Of the 1,600 tons of soil in the stockpile, approximately 300 tons have actually been shipped to Las Vegas.

Defendant argues that in September of 1958, at a meeting of the directors of Plaintiff company, at which time he was granted permission to stockpile the soil, it

was further orally agreed that he need not pay for said soil until it had actually been sold. (R-83, 86, 87, 97). Plaintiff contends that no such agreement was ever made on behalf of Wasatch Mines Company and that, in any event, no one contemplated that the soil would not be sold within a reasonable short period (R-52, 84, 95), or that Defendant would refuse altogether to sell the soil or pay for it after a lapse of 11 years.

On April 16, 1963, during a board of directors meeting of the Alta Wasatch Development Company, the agreement between the Plaintiff, Alta Wasatch Development Company, and the Defendant was mutually declared terminated, without objection from Defendant. (R-164, Cook's Deposition pages 11, 12, 19, 20). There is evidence that Defendant himself was at this meeting and voted to terminate the agreement. (R-146, 149, Exhibit E, Defendant's Deposition). Defendant disputes this evidence. (Defendant's Deposition page 46).

At a meeting of the board of directors of Plaintiff company held the same evening, Defendant made proposals ". . . concerning his desire to obtain a contract to remove soils and earths from the Wasatch Mines Company property . . .". (Exhibit H, Defendant's Deposition).

On September 23, 1963, at a meeting of the board of directors of Plaintiff company, further proposals were made by the Defendant and his attorney regarding the delinquent payment for the soil which had been removed, and regarding future soil removals. (R 138, 147, 148, 151, Defendant's Deposition page 46, Exhibit I, Defendant's Deposition).

On August 31, 1964, Mr. C. W. Love, corporate secretary of Plaintiff company, sent a letter to the Defendant instructing him not to remove any additional soil until the soil already removed had been paid for, and until proposals made at the previous meeting had been completed. (R-130, Exhibit F, Defendant's Deposition).

Thereafter, Defendant never removed any soil from Plaintiff's property and the matter rested until this action was brought.

ARGUMENT OF RESPONDENT

POINT I

THE TRIAL COURT WAS CORRECT IN RULING THAT THE TERMS OF THE AGREEMENT, IF ENTERED INTO, WERE TOO VAGUE AND UNCERTAIN FOR ENFORCEMENT.

Defendant claims to have an existing leasehold interest in the real property owned by the Plaintiff. This claim is based upon an alleged agreement executed by certain parties in 1954, together with three documents presented by the Defendant which, Defendant claims, are amendments to the original agreement. (Exhibits D-3, D-4 and D-7).

Wasatch Mines Company, Respondent herein, is the owner and operator of mineral properties, and its principal business is the sale of minerals and mineral materials, including soil.

In 58 Corpus Juris Secundum, Mines and Minerals, Section 143 (b), we read:

> . . . in a contract for the sale of minerals or interests

> therein, there must be mutual assent or meeting of the minds, a sufficient consideration, and *the contract must be clear and unambiguous,* and capable of being performed. (Emphasis added).

An analysis of the evidence clearly reveals that the terms and conditions, as set forth in Defendant's exhibits, are not only vague and uncertain, but ambiguous and incomplete.

If, as Appellant asserts, some agreement existed between Plaintiff and Defendant, what *is* the "agreement" upon which Appellant must rely? Could the "agreement" he asserts possibly give rise to the rights he asserts in Plaintiff's real property?

Defendant alleges the existence of an early agreement made sometime in 1954 between Defendant and a third party not joined in this action, and Plaintiff. No living officer of Plaintiff can recall such an agreement. Defendant admits that whatever writing existed in 1954 has been lost or destroyed (R-117, 144). He cannot recall certain terms or conditions contained in the writing, or what was required by way of compliance. He states, with respect to the original agreement, "I think it was scrapped when this was written" (Defendant's Deposition, page 23), referring to the 1956 instrument. How can any Court interpret and enforce a non-existent agreement which Defendant claims was "scrapped" in 1956?

Thereafter, Defendant carried on a variety of negotiations with Plaintiff's mining lessee, Alta Wasatch Development Company, and Plaintiff's directors, adjusting the value of the soil, determining the division of payments,

and other matters. That Defendant was operating under some form of oral or written agreement from 1954 to 1963 is not really in dispute, but the *nature* and *provisions* of the agreement, and whether it is still in effect, are the basis of the controversy.

According to the evidence presented at trial, Defendant's asserted rights stem from a confused chain of oral and written "agreements" which resulted from various negotiations. The evidence indicates that these "agreements" were formally terminated by mutual consent in 1963. Thereafter, Defendant made proposals to the Plaintiff concerning a new agreement, but no new agreement was ever agreed upon or entered into.

What was the nature of the pre-1963 "agreement"? Defendant relies upon only three separate documents to establish his "rights": (1) a "Lease Amendment" dated February 9, *1956* which purports to amend a prior lease dated February 11, *1959,* which is a practical impossibility; (2) an "Amendment to *Agency* Agreement" dated February 11, 1959, of which Plaintiff is not a party, and which is not a lease upon real property; and (3) an "Amendment to Lease" dated March 1, 1959, which deals with the division of proceeds from soil sales. None of these documents, taken separately or in combination, contain or can be construed to contain the basic elements required to vest rights in real property. It would appear that prior to 1963, Defendant had a vague understanding or agreement by which he removed soil from Plaintiff's real property. At best, the "agreement" was merely Plaintiff's consent for Defendant to take the soil, a schedule of payments for soil removed, and a division of the proceeds among the

Plaintiff, Plaintiff's mining lessee and the Defendant. It was never intended to establish a right to the real property owned by the Plaintiff and did not do so.

After the termination of the "agreements" in 1963, small quantities of soil were removed by the Defendant, but on a strictly cash sale basis, the same basis on which Plaintiff would sell soil to any other party.

POINT II

ANY LEASE, AGREEMENT, CONTRACT, PROFIT A' PRENDRE, ETC., THE DEFENDANT MAY HAVE HAD WITH THE PLAINTIFF IS NO LONGER IN EFFECT BY VIRTUE OF ITS TERMINATION IN 1963.

On April 16, 1963 at a board of directors' meeting of the Alta Wasatch Development Company, the agreement between Plaintiff, Alta Wasatch Development Company and the Defendant was declared at an end and terminated. The minutes of this meeting, (Exhibit E, Defendant's Deposition), indicate that said termination was due to Defendant's failure to pay for soil which he had removed. The minutes further indicate that Defendant was present and expressed no opposition, implying that he himself voted to terminate the agreement. This evidence was substantiated by the testimony of Lee Cook, a director of Alta Wasatch Development Company, who was in attendance at the meeting, (Cook's Deposition, pages 19, 20), and also by the testimony of Clair M. Aldrich, Esq., a Director and legal advisor for the Plaintiff, who was present, but not participating in the meeting. Mr. Aldrich testified as follows:

> . . . Alta Wasatch directors voted to throw in the sponge, wipe the slate clean, and Mr. Hopkinson was present and he voted for it. I remember that distinctly. (R-146. See also R-148, 151).

Later that same evening a meeting of the directors of Plaintiff company was held. The minute entry of this meeting, (Exhibit H, Defendant's Deposition), indicates that the purpose of the meeting was to

> . . . consider a proposition to be submitted by William Hopkinson, concerning his desire to obtain a contract to remove soils and earths from the Wasatch Mines Company property in the vicinity of the Wasatch Drain Tunnel.

This evidence was also substantiated by Mr. Aldrich's testimony. (R-146).

Defendant admits on page 58 of his Deposition that on the morning of April 17, 1963, the day following the meetings, he was informed by Mr. C. W. Love, President of Alta Wasatch Development Company and Secretary of Plaintiff company, that he no longer had a "lease."

At the September 23, 1963 board of directors' meeting (Exhibit I, Defendant's Deposition) Defendant appeared with his counsel and made proposals concerning the delinquent payments and a new agreement to remove soil. He promised to furnish a map of the area where he proposed to remove soil and to obtain a clearance from the Health Department and Forest Service. The minutes of the meeting expressly state that no action was taken on the proposals at that meeting. The matter of a new agreement apparently died when the Defendant failed to comply with his promises.

On August 31, 1964 Plaintiff's corporate secretary, Mr. C. W. Love, wrote Defendant informing him that he was to remove no soil until the amount previously removed had been paid for, and until the proposals previously made had been completed. Defendant subsequently removed no soil and the matter rested until this action was brought.

The evidence clearly shows that any agreement which may have been in existence between the parties was terminated in 1963, and further, that the Defendant was fully aware of its termination, and in fact complied with the termination.

POINT III

DEFENDANT'S FAILURE TO PRESENT EVIDENCE TO SUPPORT HIS CLAIM FOR DAMAGES JUSTIFIES THE TRIAL COURT'S RULING THAT DAMAGES WERE TOO SPECULATIVE TO WARRANT AN AWARD.

It is elementary hornbook law that damages may not be awarded where not supported by proper evidence. Contrary to Appellant's argument, damages must be established with some degree of exactness and certainty. "Damages must be proved with all the certainty the case permits and cannot be left to conjecture, guess, or speculation." 25A Corpus Juris Secundum, Damages, Section 162 (2), page 79.

The Utah Supreme Court held in the case of *Bunnell vs. Bills,* 13 Utah 2d 83, 90, 368 P. 2d 597, (1962) that in order to recover damages, the complaining party must

prove not only that a loss has been suffered, but also must prove the extent and amount of that loss. Justice Callister said, "Damages cannot be found from mere speculative and conjectural evidence." (See also *Bingham Coal and Lumber Co., et al., vs. Board of Education of Jordan School District of Salt Lake County,* 61 Utah 149, 211 Pac. 981, (1922); 15 Am. Jur., Damages, Section 356, pages 795-797).

Defendant's claim for damages is based upon the purported loss of profits he suffered as a result of Plaintiff's repudiation of the agreement. Defendant's mere showing of sales made during the preceding ten years would not be sufficient to meet his burden. In *Gould vs. Mountain States Telephone and Telegraph Company,* 6 Utah 2d 187, 309 P. 2d 802, 806, (1957) the Utah Supreme Court affirmed the Trial Court's action of setting aside a verdict for prospective profits because the complaining party had failed to show a single instance of loss of prospective business caused by Defendant's breach. In this case, Defendant Hopkinson has also failed to produce evidence of a single customer lost as a direct result of Plaintiff's action.

Appellant states that he did not attempt to make additional soil sales after 1964 because if he got a "big buyer" he would not be able to meet the demand for soil. (R-167). Prior to this time Defendant's cumulative sales of soil totalled only 560 tons to many individual purchasers during the period of 1958-1964. Since 1959 Defendant has has approximately 1,300 tons of soil in his stockpile. Defendant has never been instructed or admonished not to sell this soil. It would appear from the evidence that Defendant's loss of profits, if there are any, resulted from his

own lack of diligence rather than any alleged breach by Plaintiff.

Appellant claims further damages for expenses incurred by him in reliance upon performance of the agreement. However, Appellant failed to present any evidence indicating what these expenses were, and how they were in reliance upon an agreement.

Defendant's admission that his prayer for damages was a mere "guesstimate" (Defendant's Deposition, page 67), coupled with his failure to produce any evidence at the trial, is substantial basis for the Trial Court's ruling that the damages were too speculative to justify an award.

RESPONDENT'S CONCLUSION

The lower court, as trier of the facts, after hearing the testimony of the witnesses and analyzing the evidence presented, was unable to define the terms and conditions of any agreement between the parties. After having heard the evidence regarding its termination, the Trial Court refused to find a binding, enforceable agreement between the parties, and consequently dismissed Defendant's claim.

Defendant's claim for damages failed because of a lack of evidence to substantiate the claim.

The record contains substantial evidence to support the decisions of the Trial Court regarding the denial of Defendant's Counterclaim, and as such, it should not be disturbed on appeal.

ARGUMENT OF CROSS-APPELLANT

POINT I

THE TRIAL COURT ERRED IN RULING THAT DEFENDANT WAS NOT REQUIRED TO PAY FOR THE SOIL REMOVED UNTIL IT HAD ACTUALLY BEEN SOLD BY THE DEFENDANT.

Defendant has admitted (1) that he removed 1,600 tons of top soil from Plaintiff's property; (2) that he agreed to pay for said top soil at the rate of $4.80 per ton; and (3) that he has never paid for said top soil despite demands made upon him by the Plaintiff. (R-6)

Defendant argues that in September of 1958 the directors of Plaintiff company authorized him to defer payment for the soil removed to the stockpile until such time as it was actually sold by the Defendant. Plaintiff contends that no such agreement was ever made on behalf of Plaintiff, and that, in any event, no one ever contemplated that the soil would not be sold within a reasonable period of time.

Mr. L. L. Cook, a director of Plaintiff company, who was present at the meeting where such permission was allegedly given, testified that it was agreed that Defendant would pay for the soil as he removed it from the mountain, as he had always done in the past. (R-105, 109, 114, Cook's Deposition page 34).

In April of 1963 the Defendant, together with two directors of Plaintiff company, who were also present at the 1958 meeting, met and terminated the agreement between the parties because Defendant . . .

> . . . was in default by reason of the fact that said W. H. Hopkinson had removed some 1,600 tons and had stored the same at the home of his sister in Salt Lake and had never paid for the earth removed. (Exhibit E, Defendant's Deposition).

In September of 1963 the defendant and his attorney met with Plaintiff's board of directors and proposed that Defendant pay for the soil for which a demand had been made. The following August the Plaintiff's corporate secretary made a further and final demand upon Defendant for payment for the soil which he had removed and not paid for.

Every witness at the trial, including the Defendant, testified that it was contemplated that all of the soil in the stockpile would be sold during the Winter of 1958, or at least within a reasonable time thereafter. (R-84, 95, 104, Defendant's Deposition pages 16, 17, 52). No one dreamed that 11 years later Defendant would still have the soil in his stockpile, would still refuse to pay for it, and would even refuse to make any efforts to sell the soil.

The facts do not reflect, as held by the Trial Court, that it was the practice over the years for Defendant to pay for the soil as it was sold. In 1952, and again in 1955 when Defendant removed soil for experimentation, Defendant immediately paid for the soil as it was removed. (Defendant's Deposition pages 35, 36). Again in 1963 the Defendant removed approximately 260 tons of soil and immediately paid for it. (Defendant's Deposition pages 36, 42). The only soil which has been removed by the Defendant and not immediately paid for, is the soil which is the subject matter of this lawsuit. The evidence would

seem to indicate, contrary to the holding of the Trial Court, that it was the practice ove the years for Defendant to pay for the soil as it was removed, not as it was sold.

Assuming, arguendo, that Defendant was given permission to defer payment until this particular amount of soil was sold, what court would deny Plaintiff the right to force Defendant, after total lapse of 11 years and inaction by Defendant, to remit full payment for the soil? Defendant has had total custody of the soil and his inaction has worked a hardship upon Plaintiff. What may well have been a reasonable arrangement at the time it was purportedly made, has by Defendant's inaction and unreasonable delays become an unconscionable agreement. This Court can remedy the inequity only by requiring Defendant to pay for the soil he has had for 11 years.

Cross-Appellant prays that this court declare that the "reasonable time" to complete the sale, as contemplated by the parties to such alleged agreement, expired in 1964, when Plaintiff made the final and formal demand upon Defendant, and that the agreed upon price became due and payable notwithstanding Defendant's neglect to actually sell the soil.

POINT II

THE TRIAL COURT ERRONEOUSLY HELD THAT ANY CLAIM PLAINTIFF MIGHT HAVE WOULD BE BARRED BY THE STATUTE OF LIMITATIONS.

Appellant argues, and the Trial Court has held, that

Defendant is not obligated to pay for the top soil until such time as it is actually sold. In addition the Trial Court held that Plaintiff's claim is barred by the statue of limitations.

Rule 9 (h) of the Utah Rules of Civil Procedure provides in part as follows:

> In pleading the statute of limitations it is not necessary to state the facts showing the defense but it may be alleged generally that the cause of action is barred by the provisions of the statute relied on, referring to or describing by section number, subsection designation, if any, or otherwise designating the provision relied upon sufficiently clearly to identify it.

In *Tanner vs. Provo Reservoir Co. et al.,* 78 Utah 158, 2 P 2d 107, 111, (1931) the Utah Supreme Court held that "the defense of the statute of limitations is not available unless pleaded." In the case of *Spanish Fork City vs. Hopper,* 7 Utah 235, 26 Pac. 293, 294, (1891), wherein Defendant's Answer merely stated that the action was barred by the statute of limitations, the Utah Supreme Court held that no issue as to the statute of limitations was raised because Defendant failed to plead the section of the code relied upon.

Both Defendant's Answer (R-7) and his untimely Amendment to the Answer (R-23) fail to properly plead the statute of limitations due to his failure to specify which of the many statutes of limitations he is relying on. The trial court erred in ruling on Defendant's improperly plead affirmative defense based on some unspecified statute of

limitations, and Appellant cannot now raise or rely upon the statute of limitations.

Furthermore, it is Defendant's burden, due to his affirmative defense, to produce facts at the trial which would support the allegation that Plaintiff's claim is barred. (See *Kimball vs. McCornick,* 70 Utah 198, 259 Pac. 313, 317, (1927).). Defendant Hopkinson failed to produce any evidence in response to this burden. In fact, no mention of the statute of limitations was made by the Defendant subsequent to the "faulty" pleading.

Assuming Defendant had properly plead the statute of limitations, what particular statute is he relying on? Appellant's whole argument is that his rights are founded upon a series of written documents, which he asserts are still in effect. Appellant further contends that all of the soil was taken under the same general arrangement. The applicable statute of limitations over the type of transaction claimed by the Defendant is Section 78-12-23 (2), Utah Code Annotated, 1953, which specifies a 6 year period. The evidence presented supports Plaintiff's contention that the agreement terminated in 1963. This action was commenced well within the 6 year period following termination of the written agreement.

CROSS-APPELLANT'S CONCLUSION

This action was commenced as a simple action to collect the value of soil removed from Plaintiff's land by the Defendant, acting pursuant to an earlier permission to remove soil. The quantity of soil involved, 1,300 tons, and the value of the soil, $4.80 per ton, is not in dispute. Defendant alleges some form of agreement from Plaintiff

giving him a long term property right in the property from which the soil was removed. Defendant further claims astronomical damages by reason of Plaintiff's denial of his alleged property right. Tacked on to this absurd and completely unsupported set of charges is a claim by Defendant that, on the basis of some oral promise made in 1958, he is not *yet* obligated to pay for the soil.

The Trial Court patiently heard every shred of evidence bearing on this matter and ruled that the terms of the agreement were so speculaive as to be unenforceable and that Defendant's claim for damages could not be supported by the evidence. The Trial Court further held, contrary to the evidence, that Defendant is not obligated to pay for the soil until it had been sold by the Defendant, that he is *not yet obligated,* and further, that when it becomes due, Plaintiff's claim would be barred by the statute of limitations. This latter part of the court's ruling is inconsistent with both law and reason, and will not stand up on review.

Respectfully submitted,

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